BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WALTER STIMAX	)	
Claimant	)	
VS.	)	
	)	Docket No. 265,773
L.E. BARNES CIRCUS, INC.	)	
Respondent	)	
AND	)	
	)	
NATIONAL AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the August 31, 2001 preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish.

ISSUES

This is a claim for a March 15, 2001 accident while claimant was working for a circus in the State of Florida. In the August 31, 2001 preliminary hearing Order, Judge Frobish found that the parties' employment contract was made in the State of Florida. Accordingly, the Judge dismissed the claim for lack of jurisdiction.

Claimant contends Judge Frobish erred. Claimant argues the facts establish that the contract was made in the State of Kansas and, therefore, there is jurisdiction under the Kansas Workers Compensation Act. Claimant requests the Board to find jurisdiction under the Act and to remand the claim to Judge Frobish for further proceedings.

Conversely, respondent and its insurance carrier contend Kansas jurisdiction has not been established and that the preliminary hearing Order should be affirmed.

The only issue before the Board on this appeal is whether the parties' employment contract was made in the State of Kansas.

FINDINGS OF FACT

After reviewing the record compiled to date, the Board finds:

1. Claimant is a professional circus clown and entertainer who lives in Arkansas City, Kansas. After seeing an article in a trade publication about a new circus that was being formed, claimant contacted Mr. John Frazier, the individual who was forming the circus, and offered to work as a clown for $1,000 per week. Claimant telephoned from his home in Arkansas City and spoke with Mr. Frazier, who was in the State of Florida. Mr. Frazier advised claimant that he would speak with others and let him know. The record is not entirely clear, but that initial conversation took place sometime before October 4, 2000.

2. Approximately two weeks after their initial telephone conversation, Mr. Frazier telephoned claimant at home and asked if claimant would work as a clown for $500 per week and manage a side show for a commission. The $500 per week also compensated claimant's wife for any work that she performed. After some discussion, claimant accepted the offer.

3. Mr. Frazier sent claimant a letter dated October 4, 2000, to confirm the terms of their agreement. After making notes on the letter to reflect their oral agreement, claimant and his wife signed and returned the letter to Mr. Frazier. Claimant's wife noted on the letter that they would be independent contractors, there would be no withholding for taxes, and they would be paid a total of $500 per week regardless of the number of days per week that they worked or had performances. Claimant's wife wrote the notes on the letter as claimant neither reads nor writes.

According to claimant's uncontradicted testimony, the details added to the letter had already been discussed and agreed upon in the earlier telephone conversation with Mr. Frazier and claimant was merely conforming the letter to the parties' oral agreement. Claimant testified, in part:

> Q. (Mr. Mason) You got a letter that didn't accurately reflect what had been agreed upon, didn't you?
>
> A. (Claimant) No. Yes.
>
> Q. So all you did was wrote down what had been agreed upon?
>
> A. Right.
>
> Q. You didn't change the terms of your oral agreement with Mr. Frazier, did you?
>
> A. No, I reminded him, I fill in contract.[1]

---

[1] Preliminary Hearing, July 12, 2001; p. 90.

4. In early March 2001, claimant and his wife joined the circus in Florida. On March 15, 2001, while the circus was in Kissimmee, Florida, claimant fell from a ladder while raising the walls of the side show tent during a sudden storm. As he fell, claimant struck his head on a pipe.

5. Claimant's memory of the accident and subsequent events is clouded. He does not recall many of the facts surrounding the accident, including whether he was knocked unconscious. Further, claimant's memory is vague concerning his activities for several days after the fall.

6. At approximately 2 a.m. on March 19, claimant awoke with a terrible headache. An ambulance took claimant to a nearby hospital where he underwent surgery for a brain hemorrhage.

CONCLUSIONS OF LAW

The preliminary hearing finding that the parties' employment contract was made in the State of Florida should be reversed. At this juncture of the claim, claimant's uncontradicted testimony establishes that the parties formed an oral contract over the telephone. The Board concludes that in the parties' second telephone conversation respondent offered claimant a position with the circus and claimant accepted the offer. Therefore, as claimant accepted the offer from his home in Arkansas City, Kansas, the contract is considered to have been made in the State of Kansas. In *Shehane*,[2] the Court held:

> The basic principle is that a contract is "made" when and where the last act necessary for its formation is done. *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975). When that act is the acceptance of an offer during a telephone conversation, the contract is "made" where the acceptor speaks his or her acceptance. *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, Syl. ¶ 1, 512 P.2d 438 (1973). . .

The Workers Compensation Act applies to work-related accidents sustained outside the state when the employment contract is made within the State of Kansas, unless the contract otherwise specifically provides.

> . . . That the workmen's compensation act shall apply also to injuries sustained outside the state where: (1) The principal place of employment is

[2] *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 261, 3 P.3d 551 (2000).

> within the state; or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides . . . [3]

Based upon the record compiled to date, claimant has established a Kansas employment contract and the application of the Act.

WHEREFORE, the Board reverses the preliminary hearing finding that the Division of Workers Compensation lacks jurisdiction over this claim. Conversely, the Board finds for preliminary hearing purposes, based upon the record compiled to date, that the Division of Workers Compensation does have jurisdiction over this claim as the parties' employment contract was made within the State of Kansas. The Board remands this claim to the Judge to address the remaining preliminary hearing issues.

IT IS SO ORDERED.

Dated this ____ day of November 2001.

BOARD MEMBER

c: Orvel Mason, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

[3] K.S.A. 44-506.